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SUPREME COURT, U.S.

No. 86-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GEORGE SUMNER, DIRECTOR,
NEVADA DEPARTMENT OF PRISONS,
Petitioner,

v.

CHARLES ALBERT PHELPS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY M. EVANS, ESQ.

Suite 542
350 South Center Street
Reno, Nevada 89501
702-786-4048

Attorney for Respondent

QUESTION PRESENTED

Whether in a habeas appeal, a federal court of appeals may take cognizance of an unexhausted claim of ineffective assistance of counsel for the first time on appeal and then, avoiding the merits, remand the case for disposition in accordance with Rose v. Lundy, 455 U.S. 509 (1982).

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STATUTORY PROVISION INVOLVED

In addition to those provisions set forth in the petition for a writ of certiorari, Respondent designates the following statute as also involved in this case:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (1982).

STATEMENT OF THE CASE

In the proceedings below, Respondent Phelps attacked the legality of his state conviction in habeas corpus proceedings pursuant to 28 U.S.C. § 2254. Phelps was convicted on April 9, 1981, after a four-day jury trial in which he was represented by an appointed attorney, deputy public defender James Lucas. Uncontradicted medical testimony at the state trial indicated that Respondent suffered brain damage at birth, is classified as "borderline mentally retarded", and "has trouble getting his thoughts organized and expressing himself."

Despite the serious felony charges Respondent was facing, Lucas gave only a 100-word opening. After the close of the evidence, the prosecutor gave his summation, attacking the credibility of defense witnesses and inviting the jurors to "experience the fears," the "reprehensible predicament," and the "violation" of the complaining witness. The very last thing the prosecutor told the jury was, "It's now Mr. Lucas' time to speak for the defense." The following exchange between the court and Lucas then took place in the jury's presence:

> MR. LUCAS: Your Honor?
>
> THE COURT: Yes?
>
> MR. LUCAS: I waive.
>
> THE COURT: You are going to waive any further argument?
>
> MR. LUCAS: That's correct.
>
> THE COURT: You are not going to make any closing argument?

MR. LUCAS: None.

THE COURT: All right.

The case was submitted to the jury, which returned a guilty verdict later that day.

Respondent appealed to the Nevada Supreme Court, which dismissed the appeal on December 20, 1981. In March 1984, Respondent filed a habeas corpus petition in the district court containing unexhausted claims. The district court dismissed the petition without prejudice so that Respondent could return to state court to exhaust those claims. The state trial court denied that petition on May 11, 1984, and the Nevada Supreme Court refused to hear an appeal on July 20, 1984. Respondent then filed the instant petition in the federal district court on August 15, 1984. His petition contained the claim that his trial attorney had rendered ineffective assistance of counsel. Respondent did not, however, plead that his attorney was ineffective specifically in that he had failed to make a meaningful opening statement or any closing argument. Throughout proceedings in the district court, respondent was acting pro se.

On July 15, 1985, the district court denied the petition. Respondent appealed to the court of appeals, which appointed undersigned counsel. On appeal, counsel raised the new argument that Respondent had been denied effective assistance because deputy public defender Lucas failed to give any summation to the jury and had given only a perfunctory opening. Petitioner argued in the court of appeals that Respondent could not raise this claim for the first time on appeal.

In an unreported memorandum decision, the court took cognizance of the claim, saying "Although [Respondent] Phelps raises his claim of ineffective assistance of counsel before this court on new grounds, we need not ignore it." Phelps v. Sumner, No. 85-2377, Memorandum [Opinion] (9th Cir., filed June 10, 1986). Citing Rose v. Lundy, 455 U.S. 509 (1982), however, the court of appeals did not reach the merits of the claim. It instead remanded the case to the district court to permit Respondent Phelps "to return to state court to exhaust his new claim of ineffective assistance of counsel or to amend and resubmit the habeas petition to be to present only exhausted claims." Id.

Petitioner subsequently requested that the matter be reheard, and the court of appeals denied that request on July 3, 1986.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT OF SUFFICIENT MOMENT TO WARRANT REVIEW BY THIS COURT.

By Rule 17, this Court exercises its discretion to grant review by certiorari only when "there are special and important reasons" for doing so. No such reasons exist in this case.

Whether correct or erroneous, the decision below has no importance beyond the parties involved. The decision of the Court of Appeals for the Ninth Circuit is an unreported memorandum opinion. Under the local rules of that Circuit, the decision is entitled to no value as a precedent. "A disposition that is not for publication shall not be cited to or by this Court

or any district court of the Ninth Circuit, either in briefs, oral arguments, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Rule 21(c), Rules of the United States Court of Appeals for the Ninth Circuit. Because the decision below has no value as a precedent, its effects are confined to the parties at bar and do not extend to the legal system generally. Respondent submits that for this reason alone, review of this case by the Court should be denied.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner asserts that the decision below is "clearly in conflict with this Court's previous decisions." Petition For A Writ Of Certiorari at 16. Petitioner is wrong.

In the district court, Respondent filed a habeas corpus petition raising a number of claims. One of those was a claim that his trial attorney, a public defender, rendered ineffective assistance. He specified some ways in which he believed his trial attorney was ineffective. After denial of his habeas petition, appellate counsel advanced a new reason why Respondent was denied effective assistance of counsel: his trial attorney's failure to give a closing argument in a jury trial. The court of appeals allowed this issue to be raised for the first time on appeal.

Had the court of appeals proceeded to decide Respondent's newly raised claim, it would have violated the rule of Rose v. Lundy, 455 U.S. 509 (1982), which requires that unexhausted claims be presented in state court before federal review is available. Instead, the court disposed of

the matter exactly as required by Rose v. Lundy. Since Respondent had not exhausted his claim of that trial counsel was ineffective in failing to make a closing argument, the court remanded the case to give Respondent the opportunity to take a voluntary dismissal of the habeas petition and return to state court to exhaust that claim. See Rose, 455 U.S. at 510. This disposition is consistent with Rose v. Lundy.

Petitioner also claims that the decision below was contrary to Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, ___ U.S. ___, 106 S. Ct. 366 (1985). The easy answer to that contention is that neither of those cases dealt with the question presented in this case: whether a Court of Appeals may take cognizance of an unexhausted claim for the first time on appeal and then, avoiding the merits, remand the case for disposition in accord with Rose v. Lundy. To Respondent's reading of the cases, Strickland and Lockhart simply do not address this question.

III. THIS COURT HAS TRADITIONALLY LEFT THE COURTS OF APPEALS FREE TO DETERMINE FOR THEMSELVES WHICH ISSUES THEY WILL ENTERTAIN FOR THE FIRST TIME ON APPEAL.

Petitioner claims that the decision below is a "radical departure" from "settled appellate procedure." Petition For A Writ Of Certiorari at 20. The settled procedure he refers to is the practice of appellate courts to refuse to consider an issue raised for the first time on appeal. As this Court has previously stated, however, this practice is "not inflexible." Hormel v. Helvering, 312 U.S. 552, 556 (1941).

The so-called "radical departure" from "settled practice" is merely the type of decision this Court has traditionally left to the discretion of

the courts of appeals in the day-to-day administration of thier dockets. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121 (1976).

To the best of Respondent's knowledge, this Court has not previously identified the source of this discretion possessed by the courts of appeals. Arguably, it might stem from a respect on the part of the Members of this Court toward the operations of the lower federal courts or from a disinclination to become involved in their daily administration. In any event, the discretion to allow issues to be raised for the first time on appeal appears to be Congressionally conferred on the courts of appeals. Congress has authorized courts of appeals to dispose of cases before them "as may be just under the circumstances." 28 U.S.C. § 2106 (1982). See also Hormel v. Helvering, 312 U.S. 552, 555-56 (1941).

The court of appeals could reasonably have found this case to be one calling for a discretionary exception to the general policy against allowing new issues on appeal. As part of the record on appeal, the court had before it a transcript of the state trial at which Respondent was convicted. Undisputed expert medical testimony at that trial indicated that Respondent is organically brain-damaged and borderline mentally retarded. When he filed his habeas petition in the district court, Respondent was acting pro se. Although he pleaded ineffective assistance as a ground for relief in his petition, he did not allege specifically that his state trial

attorney was ineffective in that he failed to give a closing argument in a jury trial. The district court denied his petition, and Respondent appealed. The court of appeals then appointed undersigned counsel to represent Respondent. With counsel now representing him, Respondent raised the issue of his trial attorney's failure to give a closing argument and argued that, on the record before the court of appeals, he had been denied effective assistance under the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). The court of appeals, although ultimately declining to decide the issue, heard argument on the merits of the claim. Given its view of the merits and its reading of the record, Respondent submits, the court did not abuse its discretion by allowing the claim to be raised on appeal for the first time.

Petitioner apparently believes that this Court should narrow the discretion of the courts of appeals because otherwise there "will result . . . an unnecessary increase in workload for courts" and may result in "the withholding of habeas claims until appeals." Petition For A Writ Of Certiorari at 26. To suggest that the decision below will result in any significant increase in the burden on state and federal courts is pure speculation. Petitioner has not shown that courts of appeals generally favor allowing habeas petitioners to raise new issues on appeal. Absent such an inclination, the case where a court of appeals allows such an issue to be raised should be rare.

The fear that habeas petitioners will intentionally forego asserting a claim for relief in the district court for the purpose of raising it as a

surprise on appeal is similarly unfounded. The self-interest of habeas petitioners dictates that they not risk losing a claim by intentionally failing to raise it. The more likely case where an appeals court will be willing to allow a new claim on appeal, it is submitted, is when the claim is perceived as meritorious, but was not raised below because the habeas petitioner was acting pro se and, as in this case, appears to be mentally handicapped. Allowing the occasional, possibly meritorious claim that fits this pattern to be raised for the first time on appeal is appropriate to mitigate the harshness of legal rules as they apply to pro se, often mentally impaired litigants. After all, as this Court has observed, the "primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned." Price v. Johnston, 334 U.S. 266, 291 (1948). A rule of practice, such as that prohibiting the raising of new issues on appeal, "should not be applied where the obvious result would be a plain miscarriage of justice." Hormel v. Helvering, 312 U.S. 552, 556 (1941). The court of appeals in this case reviewed the record, heard the argument of counsel regarding the merits of the ineffective assistance claim and whether it could be raised on appeal, and exercised its discretion in favor of allowing the claim to be raised (although not decided). The court did not state its reasons, but Respondent submits that the decision probably rested on the court's view of the merits of the claim and on considerations of fairness.

Exceptions to the general policy against the raising of issues for the first time on appeal should be left to the discretion of the courts of

appeals. To the extent that the granting of the writ of certorari in Petty v. McCotter, 779 F.2d 299 (5th Cir. 1986), cert. granted, 54 U.S.L.W. 3859 (June 24, 1986), involves this Court in reviewing the exercise of the discretion of courts of appeals in this area, Respondent submits that the writ was improvidently granted.

IV. THE DECISION BELOW DOES NOT DENY PETITIONER THE ABUSE OF THE WRIT DEFENSE UNDER RULE 9(b), 28 U.S.C. fol. § 2254

Petitioner argues that under the decision below, if Respondent takes a voluntary dismissal of his habeas petition, exhausts his claim of ineffective assistance in state court, and then files a successive petition raising that claim, Petitioner will be unable to assert the technical defense of "abuse of the writ." See Petition For A Writ Of Certiorari at 25, citing Rule 9(b), 28 U.S.C. fol. 2254. How Petitioner reaches this conclusion is unclear.

The petitioner in McCotter v. Petty, now pending before this Court, has taken the same position, claiming an unfair loss of the "abuse of writ" defense:

> By remanding to allow Petty to amend his petition to include allegations first made in the appellate court, the opinion unfairly deprives the state of its abuse defense. Because there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus Petty's amended petition would not be subject to dismissal for abuse.

McCotter v. Petty, No. 85-1656, Brief of Petitioner at 23. The assumption of the petitioner in McCotter, and of Petitioner in this case, appears to be that the "abuse of writ" defense is available only when an earlier habeas petition has been decided on the merits. That assumption is not correct.

however.

A prior disposition on the merits is not a prerequiste to asserting the defense. If Petitioner returns to state court, exhausts his claim, and files a new petition, the "abuse of writ" defense will be available. Rule 9(b) of the Section 2254 Rules provides as follows: "A second or successive petition may be dismissed if the judge finds that new and different grounds are alleged, [and] the judge finds that the failure to allege those grounds in a prior petition constituted an abuse of the writ." Rule 9(b), 28 U.S.C. fol. § 2254. Rule 9(b) requires only that there be a "prior petition" before the defense can be raised; it does not require that the prior petition be decided on the merits. Thus, the disposition of the court of appeals on a basis other than the merits will not prevent Petitioner from asserting the defense when and if Respondent files another federal habeas petition.

CONCLUSION

For the above reasons, Respondent requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JEFFREY M. EVANS
Suite 542
350 South Center Street
Reno, Nevada 89501
702-786-4048
Attorney for Respondent